Supreme Court, U.S.
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No. 88-1832

In The

Supreme Court of the United States

October Term, 1988

JAMES PAUL DOHERTY,

Petitioner,

v.

SOUTHERN COLLEGE OF OPTOMETRY,

Respondent.

BRIEF IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LEO M. BEARMAN AND
SAM B. BLAIR, JR.

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS & KIRSCH
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

DOES 29 U.S.C. §794 REQUIRE SOUTHERN COLLEGE OF OPTOMETRY TO WAIVE REASONABLE, NECESSARY AND ESSENTIAL CLINICAL PROFICIENCY REQUIREMENTS IN ITS OPTOMETRIC DOCTORAL PROGRAM FOR HANDICAPPED INDIVIDUALS WHO ADMITTEDLY CANNOT PERFORM THE REQUIREMENTS?

The District Court and the Court of Appeals for the Sixth Circuit held that 29 U.S.C. §794 did not require Southern College of Optometry to eliminate reasonable, necessary and essential clinical proficiency requirements in its optometric doctoral program for Petitioner who stipulated at trial that he could not perform the requirements.

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REFERENCES TO THE LOWER COURTS' OPINIONS

The opinion in this case of the United States Court of Appeals for the Sixth Circuit is reported at 862 F.2d 570 (6th Cir. 1988) and appears in the Appendix to the Petition for Writ of Certiorari at page A-1. The opinion of the United States District Court for the Western District of Tennessee is reported at 659 F.Supp. 662 (W.D. Tenn. 1987) and appears in the Appendix to the Petition for Writ of Certiorari at page A-19.

STATEMENT OF THE CASE

Your Respondent is very dissatisfied with the presentation by Petitioner of his statement of the case. Instead of providing another version of the statement of the case, your Respondent relies upon the opinion filed by the Court of Appeals for the Sixth Circuit.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioner is seeking to overturn the decision of the faculty, administration and board of directors of the Southern College of Optometry in refusing to confer an Optometric Doctoral Degree upon Plaintiff, who was admittedly unable to perform the clinical proficiency requirements for that degree. Petitioner relies upon 29 U.S.C. §794 and argues that he was discriminated against because of his handicaps. The District Court and the Court of Appeals for the Sixth Circuit have both ruled that he was not discriminated against and that he was not

an "otherwise qualified handicapped individual" in spite of his handicap as required by 29 U.S.C. §794.

I

This Honorable Court should deny the Petition for Writ of Certiorari because Petitioner stipulated at trial that he could not perform the clinical proficiency requirements required by Southern College of Optometry for the Optometric Doctoral Degree. (R. 294, 958, 1303, Trial Exhibits 8, 9, 38, 39), *Doherty v. Southern College of Optometry*, 659 F. Supp. 662, 667 (see Appendix to Petition p. A35). Therefore, Petitioner failed to prove the first element of discrimination, namely, that he was an otherwise qualified handicapped individual in spite of his handicap.

II

Petitioner argues that he would be otherwise qualified if the clinical requirements were waived pursuant to 29 U.S.C. §794.

This Honorable Court has already passed on this question in an opinion which fully analyzes the issues raised here. In *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S. Ct. 2361, 60 L.Ed.2d 980 (1979), this Honorable Court held:

> An otherwise qualified person is one who is able to meet *ALL* of a program's requirements in spite of his handicap . . .
>
> According to these regulations [promulgated by HEW], a '[q]ualified handicapped person' is '[w]ith respect to postsecondary and vocational education

services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity. . . .' 45 CFR §84.3(k)(3) (1978) . . .

The term 'technical standards' refers to *all* non-academic admissions criteria that are essential to participation in the program in question. 45 CFR pt. 84, App. A, p. 405 (1978) . . .

A further note emphasizes that legitimate physical qualifications may be essential to participation in particular programs. We think it clear, therefore, that HEW interprets the 'other' qualifications which a handicapped person may be required to meet as including necessary physical qualifications . . .

[T]he ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program . . .

Furthermore, it is also reasonably clear that §84.44(a) does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program . . .

Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. . . .and would constitute an unauthorized extension of the obligations imposed by that statute . . .

Here, neither the language, purpose, nor history of §504 [29 U.S.C. §794] reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks authority to do so . . .

Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person . . .

> *Nothing in the language or history of §504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program.*
>
> *Id.* at 442 U.S. 406-414, 99 S. Ct. 2367-2371 (Emphasis and capitalization added.)

Pursuant to *Southeastern Community College v. Davis, supra,* the clinical proficiency requirements of Southern College of Optometry need not be waived if they are "reasonable." The undisputed testimony from Petitioner's and Respondent's experts provides that the clinical proficiency requirements in question were "reasonable," "necessary," "valuable," "essential," "crucial" and represented the appropriate standard of teaching for optometric doctoral programs generally. (R. 313, 314, 354-357, 390-393, 402, 403, 448, 449, Deposition of Dr. Raymond Homer, pp. 24-36, 768, 773, 777-784, 922, 923, 1080, 1084, 1100-1102, 1133-1135, 1137-1147, 1155)

The clinical proficiency requirements that Plaintiff could not perform involved the manipulation of four separate instruments used to determine eye pathology. Under the undisputed proof in the record if the instruments are not used properly, a patient's eye could be injured, and a patient's eye disease may go undetected and result in blindness. Also, the angle of the eye can be determined by using these instruments and that determination is crucial for an optometrist in deciding whether or not a patient's pupils may be dilated. The dilation of a patient's pupils under improper circumstances because of the failure of the optometrist to properly use the instruments in question could result in closed angle glaucoma and blindness. (R. 390-393, 448, 449, 1138-1147)

> Waiver of a necessary requirement [clinical proficiency requirements] would have been a substantial rather than merely a reasonable accommodation. *Doherty*, 659 F. Supp. at 673 ('[s]urely the law does not require that a handicapped person be accommodated by waiver of a requirement when his failure to meet the requirement poses potential danger to the public.') Cf. *Copeland v. Philadelphia Police Dep't.*, 840 F.2d 1139, 1148-49 (3d Cir. 1988).
>
> *Doherty v. Southern College of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988).

Consequently, 29 U.S.C. §794 does not require a waiver of reasonable clinical requirements simply because a handicapped individual cannot perform the clinical requirements.

III

Petitioner also argues that the clinical proficiency requirements should have been waived for Plaintiff as a "reasonable accommodation" (an allegedly different position). The plaintiff in *Southeastern Community College v. Davis, supra,* similarly argued that the clinical requirements of the nursing degree program should have been waived; yet this Honorable Court held that 29 U.S.C. §794 does not limit the freedom of an educational institution to require reasonable physical qualifications for participation in clinical health care training or degree programs such as the one at Southern College of Optometry. *Southeastern Community College v. Davis,* 442 U.S. at 414, 99 S. Ct. at 2370.

Furthermore, the licensure requirements in the State of Tennessee and other states include demonstration of

clinical proficiency with the instruments in question. (R. 824-826) The regulations promulgated with 29 U.S.C. §794 specifically provide that academic requirements that are important, essential or relate to any licensure requirement are not to be regarded as discriminatory. *Southeastern Community College v. Davis*, 442 U.S. 397, 408 (n. 9); 45 CFR §84.44.

The proof was undisputed that the clinical proficiency requirements were reasonable, necessary, essential and related directly to the licensure requirements in Tennessee. Dr. Larry Alexander, Assistant Dean at the University of Alabama Birmingham School of Optometry, testified that the instruments in question were so important to an Optometric program that they were required to be purchased by the students at U.A.B. School of Optometry. Clinical proficiency with the instruments in question in his opinion was absolutely crucial and essential. (R. 824-826, 1133-1135, 1137, 1138) Consequently, 29 U.S.C. §794 does not require a waiver of the clinical proficiency requirements for the optometric doctoral program at Southern College of Optometry.

IV

Therefore, no matter how Petitioner characterizes his arguments, he did not prove that he was an otherwise qualified handicapped individual. In further support of your Respondent's position, *see Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981) (Congress did not intend to force educational institutions to accept, readmit or graduate persons who pose a significant risk of harm to themselves or others even if the chances of harm were not

great); *Schuler v. University of Minnesota*, 788 F.2d 510 (8th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987); *Clarke v. Shoreline School District No. 412, King County*, 720 P.2d 793 (Wash. 1986); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1250 (6th Cir. 1985) (a "qualified handicapped person" is one "who, with or without reasonable accommodation, *can perform the essential functions of the position in question*," 29 CFR §1613.702(f). The post office was not required to accommodate Jasany by eliminating one of the essential functions of his job); *Pridemore v. Rural Legal Aid Society of West Central Ohio*, 625 F. Supp. 1180 (S.D. Ohio 1985); *Mackay v. United States Postal Service*, 607 F. Supp. 271 (E.D. Penn. 1985); *Daubert v. United States Postal Service*, 733 F.2d 1367 (10th Cir. 1984) (plaintiff because of back problems was held not to be an otherwise qualified handicapped individual); *Swann v. Walters*, 620 F. Supp. 741 (D.D.C. 1984); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981) (the court held plaintiff's handicap would preclude him from doing the job in question, and therefore, he could not be found to be otherwise qualified).

V

Pursuant to the above cited authorities, waiver of reasonable clinical and academic requirements that also relate to licensure requirements is not required by 29 U.S.C. §794 and its applicable regulations. Furthermore, Southern College of Optometry did reasonably accommodate Petitioner. After Petitioner failed his clinical proficiency requirements, Southern College of Optometry to assist Petitioner to become proficient in the use of the instruments for purposes of retaking the examination

provided Petitioner a full-time professor of Petitioner's choice for one full quarter, on a daily, one-on-one basis. The instruments were modified to assist Petitioner in his attempt to become proficient in their use. A case history room was made available twice daily for Petitioner to practice, and faculty members at Southern College of Optometry loaned their instruments to Petitioner for his use. All of these accommodations were accomplished without charge to Petitioner. Despite all of those reasonable accommodations, Petitioner was unable to perform with the instruments in question, as he stipulated at trial, and he re-failed the examination. (R. 1042, 1043, 1073-1075, 1077, 1079, 1080)

Certainly the accommodations made for Petitioner by Southern College of Optometry were reasonable. However, fundamental or substantial modifications to the optometric doctoral program by the waiver of the clinical proficiency requirements sought by Petitioner would not be reasonable and would violate the interest of the public in patient safety and the legitimate interests of Southern College of Optometry in preserving the integrity of their optometric doctoral program and protecting the interest of patient safety. Petitioner was not excluded from participation in, denied access to nor denied the benefits of the optometric doctoral program at the Southern College of Optometry. Petitioner simply was not able to complete the program, even with extra assistance and reasonable accommodations made by Southern College of Optometry. Even though Plaintiff is a handicapped individual, 29 U.S.C. §794 does not require that he be awarded an optometric doctoral degree when he admittedly cannot pass the "reasonable," "necessary," "valuable," "crucial"

and "essential" clinical requirements for that degree. *Alexander v. Choate*, 469 U.S. 287, 299-302, 105 S. Ct. 712, 83 L.Ed.2d 712 (1985).

VI

Petitioner apparently takes the position that because he was treated disparately, he was not able to comply with the clinical proficiency requirements established by the Southern College of Optometry. That argument, when coupled with Petitioner's stipulation that he was in fact unable to comply with the clinical proficiency requirements, is illogical and unpersuasive. Certainly no cause of action could arise out of any "disparate treatment" when Plaintiff admits that he is unable to perform with the instruments in question. Furthermore, the record does not support the assertion that Southern College of Optometry treated Petitioner disparately; to the contrary, Southern College of Optometry took all reasonable steps to accommodate and assist Petitioner in his attempt to become proficient in the use of the instruments in question.

The record is clear that the standard of Southern College of Optometry was demonstration by all students of clinical proficiency with the instruments involved. Dr. Denson Smith, the Chief of the Pathology Clinic at Southern College of Optometry testified that the instruments in question are placed directly upon the eyeball of the patient to determine the angle of the eye, the existence of tumors, retinal tears or detachments, hemorrhages, neovascularization, dangerous blood vessels or other eye diseases. All the students were observed constantly in the clinic, and the student may have been checked out in

numerous ways by the professors in the pathology clinic. Regardless of whether it was a formal or informal "checkout," *each and every student was checked out.* (R.777-784, 808)

When Petitioner began attempting to use the instruments in the Pathology Clinic in the spring quarter of 1981, Dr. Smith observed that it was very hazardous to patients' safety and health to allow Petitioner to place these instruments directly upon the eyeball of the patient. When Petitioner attempted his first "checkout" on November 18, 1981, Petitioner raked the patient's eyeball with the Zeiss 4 mirror and then put enough pressure on the eyeball with the instrument to move the eyeball back into the orbit. Petitioner was unable to perform with the instruments in question under ideal conditions with a student doctor as a patient who would not flinch. Dr. Smith believed that a patient would be injured if Petitioner used the instruments. Thus, the argument that Petitioner was treated unfairly and disparately, thereby causing his inability to meet the clinical proficiency requirements is not supported by the facts and is in direct contradiction to his stipulation that he simply could not comply with the clinical proficiency requirements.

VII

The Petition for Writ of Certiorari should be denied because the courts are not trained to establish degree requirements such as the ones challenged in this case. The Court of Appeals for the Sixth Circuit reluctant to intervene and impose its judgment in place of the judgment of Southern College of Optometry so as to alter the

College's determination of the optometric doctoral program requirements, relied upon authorities from this Honorable Court and correctly held:

> [W]e note that this case arises in an academic context where judicial intervention in any form should be undertaken only with the greatest reluctance. *See, e.g., Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 514, 88 L.Ed.2d 523 (1985) (declaring federal courts unsuited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions"). The federal judiciary is ill equipped to evaluate the proper emphasis and content of a school's curriculum. *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 89-91, 98 S.Ct. 948, 954-56, 55 L.Ed.2d 124 (1978). This is the case especially regarding degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession. *See Jansen v. Emory Univ.*, 440 F.Supp. 1060, 1062-63 (N.D. Ga. 1977), affd, 579 F.2d 45 (5th Cir. 1978); *Olsson v. Board of Higher Educ.*, 49 N.Y. 2d 408, 413, 402 N.E.2d 1150, 1153, 426 N.Y.S.2d 248, 251 (1980) ("In order for society . . . to have complete confidence in the credentials dispensed by academic institutions . . . the issuance of these credentials [must] be left to the sound judgment of the professional educators"). This judicial deference to educators in their curriculum decisions is no less applicable in a clinical setting because evaluation in a clinical course "is no less an 'academic' judgment because it involves observation of . . . skills and techniques in actual conditions of practice, rather than assigning a grade to . . . written answers on an essay question." *Horowitz*, 435 U.S. at 95, 98 S.Ct. at 958 (Powell, J., concurring) (footnote omitted).
>
> *Id.* at 576, 577.

CONCLUSION

The Petition for Writ of Certiorari should be denied because Petitioner is not an otherwise qualified handicapped individual in spite of his handicaps. He stipulated that he could not perform the clinical aspect of the optometric doctoral program at the Southern College of Optometry despite very reasonable assistance and accommodations by Respondent. Petitioner requests a waiver of the clinical proficiency requirements pursuant to 29 U.S.C. §794, but this Honorable Court has previously ruled in *Southeastern Community College v. Davis, supra,* that reasonable clinical requirements in medical academic fields should not be waived, and 29 U.S.C. §794 does not require any substantial modifications to the educational institution's program. This Petitioner raised no issues not already fully resolved by *Southeastern Community College v. Davis, supra* and *Alexander v. Choate, supra.* Thus, your Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Leo M. Bearman
LEO M. BEARMAN

/s/ Sam B. Blair, Jr.
SAM B. BLAIR, JR.

Attorneys for your Respondent
Southern College of Optometry

OF COUNSEL:

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS & KIRSCH
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000